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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AL., PETITIONERS

v.

LINCOLN W. MULKEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the Supreme Court of California in *Reitman* v. *Mulkey* (R. 14–50, 85) and *Snyder* v. *Prendergast* (R. 81–84) are reported at 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P. 2d 825, and 64 Cal. 2d 877, 50 Cal. Rptr. 903, 413 P. 2d 847, respectively. The memorandum decision of the Superior Court of Los Angeles County in *Prendergast* v. *Snyder* (R. 71) is unreported.

JURISDICTION

The judgments of the Supreme Court of California in both cases were entered on May 10, 1966. The petition for a writ of certiorari was filed on August 25,

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1966, and granted on December 5, 1966 (385 U.S. 967, R. 88).[1] The jurisdiction of this Court rests on 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides in pertinent part:

> * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 26, of the California Constitution (enacting Proposition 14) provides:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
>
> "Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.
>
> "Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or fam-

[1] A single petition for a writ of certiorari was filed covering both cases.

ilies living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable.

STATEMENT

I. THE PROCEEDINGS BELOW

Reitman v. *Mulkey*:

On May 29, 1963, the Mulkeys, who are husband and wife and members of the Negro race, filed a complaint in the Superior Court of California under Sections 51 and 52 of the California Civil Code [2] (R. 2–5).

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[2] Section 51 of the California Civil Code provides:

All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Section 52 of the California Civil Code provides:

Whoever denies, or who aides, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national

They alleged that the defendants, owner and managers of an apartment building in Santa Ana, refused to rent them an apartment solely because of their race and color (R. 3). The prayer was for an injunction restraining the defendants from refusing to rent them an apartment in the building and for $50,000 in general damages and $250 in statutory damages (R. 4).

After the adoption of Proposition 14 (see *infra*, pp. 8–10), on December 23, 1964 the defendants filed a motion for summary judgment requesting that the complaint be dismissed on the ground that Sections 51 and 52 of the California Civil Code, insofar as they were relied upon by the Mulkeys, were inconsistent with Proposition 14. The Mulkeys countered that Proposition 14 violated the federal Constitution and therefore should not bar their action. On January 8, 1965, the trial court, relying on Proposition 14, entered its judgment for the defendants (R. 12). The Mulkeys appealed to the Supreme Court of California (R. 13).

That court treated the case as an appeal from a judgment on the pleadings. It based its decision solely on federal grounds (R. 17, 19, 31). After surveying the background against which Proposition 14 was enacted, the court concluded that it was proposed in response to California's fair housing legislation "with the clear

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origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right" (R. 18). Rejecting the Mulkeys' contention that the States have an affirmative duty under the Fourteenth Amendment to prohibit racial discrimination in the sale and rental of housing (R. 21–22), the court viewed the crucial question as whether the State was sufficiently involved in the discrimination practiced by the realtors in this case to fall within the proscription of the Fourteenth Amendment (R. 20). After reviewing a series of decisions of this Court—*Shelley* v. *Kraemer,* 334 U.S. 1; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Marsh* v. *Alabama,* 326 U.S. 501; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461; *Nixon* v. *Condon,* 286 U.S. 73; *Evans* v. *Newton,* 382 U.S. 296; *Robinson* v. *Florida,* 378 U.S. 153; and *Anderson* v. *Martin,* 375 U.S. 399—the California court concluded (two Justices dissenting) (R. 27):

> The instant case presents an undeniably analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted * * *. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. * * *

The judgment of the trial court in favor of the de-

fendants was accordingly reversed. A petition for rehearing was denied on June 8, 1966 (R. 86).

Snyder v. *Prendergast*:

The Prendergasts are husband and wife. Mr. Prendergast is Negro; Mrs. Prendergast is Caucasian (R. 51). In July 1964 Mrs. Prendergast rented an apartment on a month-to-month tenancy in a building located in Los Angeles owned by Clarence Snyder. She took up residence in the apartment by herself while awaiting the transfer of her husband, who was working in San Francisco. In October 1964, while Mr. Prendergast was temporarily in Los Angeles, he met Margaret Keefer, a realtor representing Mr. Snyder (R. 52). In November, Mr. Prendergast moved into the apartment with his wife. On December 1, the Prendergasts received a notice purporting to terminate their tenancy and giving them 30 days in which to leave (R. 53, 55).

On December 23, 1964, the Prendergasts filed a complaint in the Superior Court of California alleging the above facts and asking for an injunction restraining the defendant from evicting them and from discriminating on the basis of race in renting apartments in the building in which they lived (R. 51–55). The defendant filed a cross-complaint and moved for summary judgment (R. 58, 63–66), asserting that he was entitled to terminate the Prendergasts' tenancy even if his sole reason for doing so was the race of Mr. Prendergast (R. 65–66).

On March 15, 1965, the trial court filed an order denying the Prendergasts' motion for a preliminary injunction and the defendants' motion for summary

judgment (R. 71). On the same day the court filed a memorandum opinion (R. 71). The court did not think it necessary to reach the question of whether Proposition 14 was valid, and thus a good defense to the Prendergasts' complaint. Rather, it held that, even if Proposition 14 nullified Sections 51 and 52 of the Civil Code insofar as these sections were invoked by the Prendergasts, the court was precluded by *Shelley* v. *Kraemer, supra,* and *Abstract Investment Co.* v. *Hutchinson,* 204 Cal. App. 2d 242, from judicially enforcing a landlord's decision to terminate a tenancy on racial grounds (R. 71–78). On March 31, 1965, the court filed its judgment dismissing the complaint without prejudice and the cross-complaint with prejudice (R. 79–80).

On appeal, the Supreme Court of California described the trial court's decision as follows (R. 83):

> The trial court in the present case concluded that it was bound by the *Abstract Investment Co.* case and, further, that if article I, section 26 [Proposition 14], which was adopted following the decision in that case, could be construed as requiring a court to enforce a landlord's decision to evict a tenant because of race, it could not be given that effect for federal constitutional reasons.

The court continued (R. 83–84):

> Although it appears that the instant case is factually indistinguishable from the *Abstract Investment Co.* case, we are not required to rely upon that case in affirming the judgment

herein. We have held today that article I, section 26, upon which defendant relies for the declaration of his rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment. (Mulkey v. Reitman, *ante,* p. 1.) For that reason, as well as those relied upon by the trial court, defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed.

A petition for rehearing was denied on June 8, 1966 (R. 87).

II. THE LEGISLATIVE BACKGROUND OF PROPOSITION 14

Prior to the adoption of Proposition 14, California had a comprehensive statutory scheme prohibiting discrimination on account of race, color, religion, national origin or ancestry in the sale and rental of private and publicly assisted housing. In 1959 the California Legislature enacted the Unruh Civil Rights Act, Sections 51 and 52 of the California Civil Code. This Act entitled all persons, without regard to race, color, religion, ancestry or national origin, "to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." It was construed by the California courts to cover real estate brokers and all businesses engaged in selling or leasing residential housing. *Lee* v. *O'Hara,* 57 Cal. 2d 476, 20 Cal. Rptr. 617, 370 P. 2d 321; *Burks* v. *Poppy Construction Co.,* 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P. 2d 313. The Legislature, in 1959, also enacted the Hawkins Act which prohibited racial discrimination in some kinds of publicly assisted housing.

The Rumford Fair Housing Act, Sections 35700–35744 of the California Health and Safety Code, enacted in 1963, superseded the Hawkins Act. It prohibited discrimination on account of race, color, religion, national origin, or ancestry in the sale or rental of private housing accommodations in dwellings containing more than four units. It also gave the State Fair Employment Practice Commission, an administrative body, the responsibility of enforcing the Rumford Act.

Proposition 14 was adopted as a constitutional amendment, through the "initiative process," in the November election of 1964. See Article 4, Section 1, of the California Constitution.[3] Prior to the election, so-called "Ballot Arguments," for and against the proposal, were distributed to the voters at State expense. See Cal. Const., Art. 4, Sec. 1; Art. 18, Sec. 1. Under California law these are acceptable documents for ascertaining legislative intent.[4] Almost the entire "Ballot Argument" in favor of Proposition 14 was devoted to the alleged demerits of the Rumford Act

[3] Under California law, a proposed amendment to the State Constitution may be initiated by the electorate if supported by a certified petition signed by qualified voters equal in number to eight per cent of all votes cast for Governor at the last general election in which a Governor was elected. The Secretary of State is to submit the proposed amendment to the people at the next general election occurring 130 days after he receives the petition. If a majority of the people voting on the amendment approve it, it becomes effective five days after the date of the official declaration of the vote by the Secretary of State.

[4] See *People* v. *Ottey*, 5 Cal. 2d 714, 723–724, 56 P. 2d 193, 197–198; *Beneficial Loan Soc.* v. *Haight*, 215 Cal. 506, 515, 11 P. 2d 857, 860.

(Pet. App. at 4–6). Thus, after reminding the voter that the Rumford Act provides that most home and apartment owners "may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin or ancestry," the "Ballot Argument" continues:

> The Rumford Act establishes a new principle in our law—that state appointed bureaucrats may force you, over your objections, to deal concerning your own property with the person they choose. This amounts to seizure of private property.

ARGUMENT

INTRODUCTION AND SUMMARY

1. Proposition 14 licenses invidious discriminations in one of the most vital and consequential activities—the purchase and rental of housing. Indeed, it touches—in our view, aggravates—a problem that has been of constitutional and legislative concern for over a century. Even before the adoption of the Fourteenth Amendment the Thirty-Ninth Congress characterized the right to hold property as one of "those fundamental rights which appertain to the essence of citizenship", "the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery" (*Civil Rights Cases*, 109 U.S. 3, 22). Invoking its power to enforce the Thirteenth Amendment, Congress provided in the very first Civil Rights Act, in 1866, that all citizens of the United States, "of every race and color", shall have the same right * * * to inherit, purchase, lease, sell, hold, and convey real and personal property * * * as is enjoyed by white

persons, * * * any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." Act of April 9, 1866, § 1, 14 Stat. 27. Two months later, the same Congress proposed the Fourteenth Amendment, which was understood as incorporating into the Constitution the guarantees of the Civil Rights Act of 1866.[5] And shortly after ratification of the Amendment, a subsequent Congress expressly reenacted the 1866 provision in the Enforcement Act of 1870. Act of May 31, 1870, § 18, 16 Stat. 144, 146.

The law remains on the statute books today. R.S. § 1978, 42 U.S.C. 1982. The right involved is not a mere abstract privilege to purchase or lease property which is satisfied if Negroes are not absolutely disabled from acquiring property. The constitutional and statutory guarantee includes also an immunity from being "fenced out" of an area on the ground of race. See *Buchanan* v. *Warley, supra; Harmon* v. *Tyler,* 273 U.S. 668; *City of Richmond* v. *Deans,* 281 U.S. 704; *Shelley* v. *Kraemer, supra; Hurd* v. *Hodge, supra; Barrows* v. *Jackson,* 346 U.S. 249. To be sure, despite its absolute language, the existing statute has been held to protect only against State action. *Corrigan* v. *Buckley,* 271 U.S. 323; see *Hurd* v. *Hodge, supra,* 334 U.S. at 29. See, also, *Civil Rights Cases, supra,* at 16–17. But this does not detract from the conclusion that the right to freedom from discrimination in housing has

[5] See *Slaughter-House Cases,* 16 Wall. 36, 70; *Civil Rights Cases, supra,* 109 U.S. at 22; *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369; *Buchanan* v. *Warley,* 245 U.S. 60, 78–79; *Oyama* v. *California,* 332 U.S. 633, 640, 646; *Shelley* v. *Kraemer,* 334 U.S. 1, 10–11; *Hurd* v. *Hodge,* 334 U.S. 24, 32–33; *Takahashi* v. *Fish Comm'n,* 334 U.S. 410, 419–420.

enjoyed a special status under the Fourteenth Amendment. See *Hurd* v. *Hodge, supra,* 334 U.S. at 33.

The fundamental character of the right is reflected in the fact that State-imposed residential segregation was held unconstitutional as early as 1917 (*Buchanan* v. *Warley, supra*), at a time when enforced segregation in public and private schools was condoned (*Berea College* v. *Kentucky,* 211 U.S. 45; see *Gong Lum* v. *Rice,* 275 U.S. 78, 85–87; *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 344, 349), as it was with respect to transportation (*Plessy* v. *Ferguson,* 163 U.S. 537; see *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.,* 235 U.S. 151, 160) and other activities (*e.g., Pace* v. *Alabama,* 106 U.S. 583). So, also, it is revealing that in the restrictive covenant cases (*Shelley* v. *Kraemer, supra; Hurd* v. *Hodge, supra; Barrows* v. *Jackson, supra*), the Court found prohibited "State action" in the apparently neutral judicial enforcement of private discriminatory agreements—invoking a doctrine which it has declined to follow elsewhere. See, *e.g., Bell* v. *Maryland,* 378 U.S. 226, 328–333 (opinion of Black, J., dissenting). We emphasize accordingly that the Fourteenth Amendment's injunction against discrimination is to be applied strictly to residential segregation and that it is indeed appropriate to search out State action which supports discrimination of this character.

It is relevant to add that housing discrimination on the ground of race or religion or national origin inflicts serious and needless injury without furthering personal liberty in any meaningful way. The right to choose a place to live is a basic one. No one can

gainsay the gravity of the harm that invidiously discriminatory housing practices inflict on the immediate victim and on society as a whole. We need not elaborate here on the evils of a systematic "fencing out" of minorities from reserved neighborhoods and the consequent ghetto. The resulting disadvantages and discriminations—in education, employment and other activities—are sufficiently documented.[6]

There are no legitimate countervailing interests. Indeed, the seller—except for the pressures of his former neighbors—has no real concern about the identity of the buyer. Nor does the absentee landlord personally care about the race or religion or ethnic background of his tenants. Whatever may be said with respect to places of public accommodation (see *Bell* v. *Maryland,* 378 U.S. 226, 245–246, 252–255, 260–283) (Douglas, J., concurring); 312–315 (Goldberg, J., concurring); 342–343 (Black, J., dissenting), real estate transactions normally involve no arguable claim of privacy or freedom of association. Nor is the general interest in preserving a free and pluralistic society affected. On the contrary, a refusal to deal on racial, religious or ethnic grounds more often betrays subservience to group attitudes than robust individuality; liberty is not the loser when the pressures of conformity to prejudice are removed by law.

2. Proposition 14 (incorporated in the California Constitution as Section 26 of Article 1) ordains that—

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[6] See, *e.g.*, U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967) at 20–25. See, generally, McEntire, *Residence and Race* (*Final and Comprehensive Report to the Commission on Race and Housing*) (1960); Abrams, *The City Is the Frontier* (1965); Weaver, *The Negro Ghetto* (1948).

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

The constitutional amendment applies to all residential property (except transient hotels) and to all transactions except sales and rentals by the State and its subdivisions of government-owned property. On its face, the provision sanctions racial, religious and ethnic discriminations in real estate dealings. Indeed, viewed against the background of California's existing fair housing laws—which it annulled—and in the light of the arguments advanced in support of the proposal, the State Supreme Court expressly found that this was the "clear intent" of Proposition 14, for which it could "conceive" "no other purpose" (R. 18, 31). The necessary effect of the provision is to withdraw the pre-existing protection against invidious discriminations in the sale and rental of housing, substituting an absolute, affirmative right to engage in such discriminations, and, short of subsequent amendment to the State constitution, to permanently enjoin all official action—whether by the legislature, the executive or the courts, and whether at the State or local level—tending to inhibit such discriminatory conduct. The question is whether a measure with this purpose and effect contravenes the injunction of the Fourteenth Amendment that "No State

shall * * * deny to any person within its jurisdiction the equal protection of the laws." The California Supreme Court thought so. We agree.

The basic vice of the provision, we submit, is that it oversteps the bounds of neutrality. The balance of our brief is devoted to that demonstration. We state the considerations separately, although we believe that the ultimate judgment may be made on the basis of their cumulative impact. In summary, we challenge Proposition 14 on three counts:

(1) Because it does not merely repeal existing fair housing laws, but expressly purports to create an affirmative right to discriminate, which all State officers are enjoined to uphold, the provision gratuitously gives an official imprimatur to invidious private practices. That, we suggest, is a violation of the State's constitutional obligation to abstain from actively promoting offensive discriminations. (*Infra,* pp. 16–26.)

(2) By incorporating Proposition 14 in its constitution, the State has again abandoned the role of observer and entered the arena to support private discrimination. The constitutional haven for Proposition 14, combined with its unequivocal wording, permanently disables all branches of the government—including the legislature itself and all subdivisions of the State—from taking corrective action; and unduly prejudices the opportunity of the affected minorities to invoke the normal political processes. (*Infra,* pp. 26–32.)

(3) Finally, insofar as the provision controls transactions in which the State is involved—albeit not as

the owner of the property—it prohibits State agencies from discharging their constitutional duty to assure against invidious discriminations. While the California Supreme Court has not expressly so construed Proposition 14, the text leaves little doubt of its overbreadth. (*Infra*, pp. 32–47.)

I. PROPOSITION 14 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT PROMOTES INVIDIOUS DISCRIMINATION

We do not argue that the State of California was disabled from repealing its prior housing enactments. Nor do we believe it necessary to decide whether preexisting common law rules bearing on that subject might have been codified in some statutory form. The vice of Proposition 14—as its terms indicate and as its context and setting make the more evident—is that it affirmatively invites and promotes invidious discrimination in the sale and rental of housing. The Supreme Court of California has so assayed and construed it. That court's construction is authoritative here.

We begin with the settled proposition that the State may not promote private discrimination based on race, religion or national origin, even if, in the absence of official involvement, those practices would be beyond the control of the Fourteenth Amendment. Of course, the State cannot compel individuals to engage in such discriminations—*e.g.*, *Buchanan* v. *Warley, supra; Peterson* v. *Greenville,* 373 U.S. 244. But that is not the limit of the prohibition. In some contexts, enforcement of private choices, uninfluenced by official action, is forbidden. *Shelley* v. *Kraemer,*

supra; Barrows v. *Jackson, supra.* And, of particular relevance here, the State may not designedly facilitate the discriminatory conduct of individuals or lend its cooperation to that end. *E.g., Robinson* v. *Florida,* 378 U.S. 153; *Anderson* v. *Martin,* 375 U.S. 399; *Goss* v. *Board of Education,* 373 U.S. 683. See *United States* v. *Guest,* 383 U.S. 745, 756–757; *Bell* v. *Maryland,* 378 U.S. 226, 326, 333 (Black, J., dissenting). Thus, the *Anderson* case held that, although individual voters are constitutionally free to select their elective officers partly, or even solely, on the basis of race, the State may not designate the race of the candidates on the ballot. The reason is that, while such governmental action neither denies nor abridges the voter's freedom of choice, it does gratuitously prompt and facilitate his succumbing to racial prejudice.

In sum, while the State, if otherwise uninvolved, normally has no obligation to take steps to enjoin or punish the discriminatory conduct of individuals, it cannot weight the scales on the other side—however slightly.

Ideally, short of combating it, the State should maintain a discreet silence and avoid all action affecting private discrimination. The basic rule is that the Equal Protection Clause does not tolerate the erection of a "shield of State law or State authority" to protect private discriminatory acts. *Civil Rights Cases, supra,* 109 U.S. at 17. See *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson, supra.* To be sure, that principle must sometimes yield. Occasionally, legitimate governmental action may incidentally assist private discrimination without running afoul of the Fourteenth Amendment on that account. To cite an

extreme example, although the indication of religious affiliation on military "dog tags" may facilitate religious discrimination, surely no one would challenge that necessary practice because of the unavoidable risk involved. So, also, the State courts have generally proceeded on the premise that the State's interest in maintaining law and order is sufficient to justify lending its policemen and its courts to enforce the discriminatory decision of a property owner to exclude particular persons—even if the availability of these remedies makes discrimination easier. And, finally, assuming the State is free to decline relief to the victims of invidious housing practices, we may concede, for present purposes, that a repeal of pre-existing fair housing legislation is permissible. But, if we tolerate such governmental action in support of invidious discrimination, it is only because, in an orderly society, that seems the necessary corollary of the assumption that the Fourteenth Amendment does not require the States to regulate wholly private conduct. The principle remains that the State cannot promote discrimination based on race, religion or national origin.

That, we stress, is the vice of Proposition 14. By the enactment in suit, California has done more than repeal anti-discrimination legislation. Nor was its action necessary to avoid resort to self-help. The plain fact is that insofar as it does not stop at repealing pre-existing statutes, but solemnly sanctions an affirmative right to discriminate invidiously, Proposition 14 involves the State gratuitously—and meaningfully—on the side of private discrimination.

Casuists may debate whether there is an analytical

distinction between the State's failure to provide a remedy for discrimination—which, in legal effect, creates a privilege to discriminate—and the declaration of a right to discriminate. Yet, surely there are occasions when the manner in which a privilege is recognized is itself significant because it carries the ingredient of incitement.

To illustrate, we may suppose a solemn statutory declaration to the effect that "the policy of the State is to perpetuate residential segregation on the basis of race, and, to that end, no officer or agent of the State shall interfere, directly or indirectly, with the right of every person to refuse to sell or lease to any person on any ground whatsoever, including the race of the prospective buyer or tenant." One might argue that, in the eye of the law, this is comparable to a court's action in declining to order a landlord to execute a lease to a prospective tenant who was refused solely on racial grounds. The analysis would be that the mention of race in our hypothetical provision is mere surplusage; that the characterization of the privilege to refuse to deal as a "right" was no more than the obverse of the non-right of the would-be buyer or tenant; and that the statement of public policy was a legally ineffective declaration in the air. Yet, although it carries not the slightest legal compulsion and erects no obstacle to non-discriminatory conduct, we take it for granted that the Fourteenth Amendment forbids such an enactment—even where it tolerates judicial enforcement of the "common law right" to discriminate.

The reason of the distinction must be that our hypothetical provision unnecessarily oversteps the

boundary of neutrality by promoting invidious discriminations. The same principle applies here. Indeed, although Proposition 14 does not expressly declare the State's preference in favor of discrimination, nor mention race, the text is otherwise comparable to that of our example. And, as construed by the Supreme Court of California in its setting, the provision must be read as concerned only with discriminations based on race, religion or national origin.

As we understand it, this is the basis of the opinion of Mr. Justice Stewart in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726–727. He there wrote with respect to a less obviously offensive statute than Proposition 14:

> * * * In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which *permits* the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers * * *." There is no suggestion in the record that the appellant as an individual was such a person. *The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment.* [Emphasis added.]

While the dissenting Justices in *Burton* disagreed with Mr. Justice Stewart's reading of the Delaware Court's opinion, they agreed that, if the statute did authorize a discriminatory classification, it would be

invalid under the Fourteenth Amendment. After quoting the Delaware Court, Mr. Justice Harlan wrote (365 U.S. at 729):

> If, in the context of this record this means, as my Brother STEWART suggests, that the Delaware court construed this state statute "as authorizing discriminatory classification based exclusively on color," I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment.

And Mr. Justice Frankfurter said (365 U.S. at 727):

> If my brother [Stewart] is correct in so reading the decision of the Delaware Supreme Court, his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment. * * *

This approach is not novel. In 1914, a unanimous Court speaking through Mr. Justice Hughes in *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, expressed a similar view. The Court there invalidated an Oklahoma statute which permitted railroads to "provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodations for negroes." 235 U.S. at 161. The ground of the ruling was that, although the statute did not compel the inequality, the carrier who elected to deny equal services to Negroes would be "acting in the matter under the authority of a state law" and therefore violating the Fourteenth Amendment (235 U.S. at 161–162). See,

also, *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959, 968 (C.A. 4), certiorari denied, 376 U.S. 938; *Boman* v. *Birmingham Transit Co.,* 280 F. 2d 531 (C.A. 5); *Civil Rights Cases, supra,* 109 U.S. at 17.

The rationale of those opinions appears to be that private conduct is an act done "under color of law" when a State statute expressly authorizes it. That is consistent with the original understanding of the Fourteenth Amendment. Indeed, the draftsmen of the Reconstruction statutes which reach only acts done "under color of law"—then, as now, viewed as coextensive with the concept of "State action" (*United States* v. *Price,* 383 U.S. 787, 794, n. 7)—made clear that they were intended not only as shields against violations by State officers abusing their official powers,[7] but were directed also at "the meanest man in the streets [who] covers himself under the protection or color of a law or regulation, or constitution of a State," one of the objects being to "prevent any private person from shielding himself under a State

[7] To be sure, the principal thrust of the decisions construing civil rights legislation which uses that phrase is that acts done "under color of office" which violate State law are nevertheless committed "under color of law." See *United States* v. *Classic,* 313 U.S. 299, 325–329; *Screws* v. *United States,* 325 U.S. 91, 107–113; *Williams* v. *United States,* 341 U.S. 97, 99–100; *Monroe* v. *Pape,* 365 U.S. 167, 172–187. But it does not follow, because "under color of law" includes illegal acts of officials, that those words do not also encompass the conduct of private individuals invoking the authority of local law to violate federal rights. See *Civil Rights Cases,* 109 U.S. 3, 16; cf. *Terry* v. *Adams,* 345 U.S. 461; *Gayle* v. *Browder,* 352 U.S. 903; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Peterson* v. *Greenville,* 373 U.S. 244.

regulation." Cong. Globe, 41st Cong., 2d Sess., p. 3663.[8]

But, at all events, there are other practical differences between an enactment like Proposition 14 and mere legislative inaction with respect to housing discrimination. First, the impact on State officials is quite different. Certainly, the equitable discretion of a judge to decline to enforce the discriminatory decision of a landowner, (cf. Mr. Justice Frankfurter, concurring, in *Hurd* v. *Hodge, supra,* 334 U.S. at 36), is diminished when the positive command of a legislative text instructs his action. So, also, the substitution of an express injunction against interference severely limits the latitude of all executive officials to encourage non-discrimination in a variety of ways. Even benevolent efforts at education and mediation may be halted, or at least embarrassed, if, as here, the text of the provision expressly restrains all State agencies from "denying or abridging," even "indirectly," the newly declared right to discriminate. Indeed, as we later demonstrate (*infra,* pp. 32–41), an overboard injunction like Proposition 14 may inhibit State officials from discharging their federal consti-

[8] This statement by Senator Sherman was made with reference to the bill that became the Enforcement Act of May 31, 1870 (16 Stat. 140), which, in § 18, re-enacted and extended Section 1 of the Civil Rights Act of 1866 (14 Stat. 27), the progenitor of 42 U.S.C. 1982. He reiterated the thought that "persons" as well as "officers" could discriminate "under color of existing State laws, under color of existing State constitutions" in the same colloquy. Cong. Globe, 41st Cong., 2d Sess., p. 3663. See, also, Senator Trumbull's statement with respect to the meaning of "color of law" in the 1866 Act. Cong. Globe, 39th Cong., 1st Sess., p. 1758.

tutional obligation to assure non-discrimination in transactions in which the State is involved.

The prejudicial effect of an official declaration of the right to discriminate is by no means confined to the State officers who are, in terms, addressed by the provision. Just as the amendments to the federal Constitution which speak directly to government also communicate their message to the citizenry, so does the present enactment. The beneficiaries of the provision are encouraged and emboldened by the express sanction of the practices involved. Conversely, the victims are deterred from seeking to enter segregated neighborhoods and segregated apartment buildings. And these effects are plainly aggravated when the rule is announced in a positive text of State-wide application.

To the layman at least, specific recognition of a "right"—so labelled—in a published text of positive law constitutes a special and persuasive encouragement. As witness to this, one need only cite the notice to quit, wholly for racial reasons, served on the tenant in *Hill* v. *Miller,* 50 Cal. Rptr. 908, 909, 413 P. 2d 852, 853, a companion case not brought here:

> The sole reason for this notice is that I have elected to exercise the right conferred upon me by Article I Section 26, California Constitution, to rent said premises to members of the Caucasian race.[9]

The ongoing force of explicit declarations of right and their tendency to acquire an influence beyond the

[9] We note that the property-owner in *Hill*, ultimately prevailed below, notwithstanding the unconstitutionality of Proposition 14, because his single-family dwelling was not regulated by California's fair housing laws. See 64 Cal. 2d 757, 51 Cal. Rptr. 689, 415 P. 2d 33.

words themselves are exaggerated when they enjoy constitutional solemnity. An express "constitutional right" is, in common acceptance, an almost sacred thing, strong and inviolable. What is true of the federal Bill of Rights is presumably applicable also to the comparable provisions of a State constitution: the texts generally are not read grudgingly, but rather, are viewed as stating the official philosophy of the jurisdiction (*e.g., De Jonge* v. *Oregon,* 299 U.S. 353, 365) and as controlling not only the immediate subject but reaching to its "penumbra" (*Griswold* v. *Connecticut,* 381 U.S. 479). Proposition 14 invites such an expansive reading by tracking the absolute prohibition of the First and Fifteenth Amendments against "denial or abridgement" of the right declared and by adding the unequivocal injunction that no such interference shall be condoned whether accomplished "directly" or "indirectly."

In short, the provision in suit has an undeniable impact in practice—on the officers of the State who are directly addressed and on the beneficiaries (and the victims) of the provision—which could be achieved in no other way. Indeed, that is doubtless why Proposition 14 took the form it did. If the only purpose had been to disengage the State from the troublesome task of controlling private discriminations with respect to housing, a simple repeal of existing laws would have sufficed.[10] Yet no other objective

[10] We note that such a repeal could have been effected by the initiative process, which operates both for ordinary legislation and amending the State constitution. Indeed, a proposal for *legislative* action may be initiated by the electorate upon the filing of a petition signed by only 5 percent of the number who voted in the previous gubernatorial election—as contrasted to 8

was arguably legitimate. The gratuitous assurance that there was an affirmative right to discriminate invidiously could only encourage such offensive practices, without the slightest pretext to serving a proper State concern. In going beyond "the least possible power adequate to the end proposed" (*Anderson* v. *Dunn,* 6 Wheat. 204, 230–231, quoted in *Toth* v. *Quarles,* 350 U.S. 11, 23), California, we submit, has overstepped the constitutional line.

II. PROPOSITION 14 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT SPECIALLY INSULATES THE RIGHT TO ENGAGE IN INVIDIOUS DISCRIMINATIONS FROM THE NORMAL POLITICAL PROCESSES OF CHANGE AND THEREBY PREJUDICES THE AFFECTED MINORITIES

We have already noticed some of the effects of California's decision to enshrine the "right" to discriminate in its constitution. It is a circumstance of aggravation, magnifying both the affirmative impact of the provision in the direction of discrimination and the inhibition of efforts towards residential desegregation. But the status of Proposition 14 as a constitutional text has another related, but distinct, consequence as well. It is this: that, by sheltering the right to discriminate in its constitution, the State has accorded it a unique insulation from the normal political processes, both locally and at the State level. In our view, even if it were permissible to solemnly codify the "common law right" to discriminate invidiously in real estate transactions, the attempt to freeze it into the law, beyond the effective challenge of the victims, violates the constitutional command of strict neutrality in this area.

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percent required for directly initiating legislation or a constitutional amendment. See Cal. Const., Art. 1, Sec. 4.

By virtue of its constitutional form and its all-inclusive injunction against both State and local governments, Proposition 14 lends both permanence and pervasiveness to the right declared. It is objectionable in both respects.

1. To specially shield discriminatory practices from the normal political processes of change is not consistent with the injunction of the Fourteenth Amendment that "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." In the circumstances, withdrawing the usual avenues of redress which the law provides in other cases works a serious inequality. Whatever might be said of a State constitutional provision that insulated economic regulations adversely affecting one group or another, we submit the State cannot so disadvantage the victims of invidious personal discrimination.

Of course, the example of traditional constitutional guarantees enshrined in a "Bill of Rights" does not bear on the propriety of California's action here. Because such a shelter can be afforded those rights which the federal Constitution requires the States to protect—like freedom of speech—does not mean that comparable insulation can be given to practices which are constitutionally tolerated only so long as the State avoids involvement. Thus, assuming provisions against amendment have binding force, it would seem clear that a perpetual bar to the repeal of the portion of the California Constitution that incorporates Proposition 14 would run afoul of the Fourteenth Amendment, whereas a similar stipulation with respect to the constitutional guarantee of freedom of religion would not. So, also, we suppose all would concede to be con-

stitutionally objectionable any provision that froze into the law the "right" announced by Proposition 14 for fifty years, or until five successive referenda had approved its repeal.

One ground of challenge to these hypotheticals might be interference with the present and personal right of the living to make their own political choices, free of shackles imposed by their ancestors, with respect to all matters in which the federal Constitution leaves them an option. But we believe the Equal Protection Clause also opposes these results because they prejudice the question in favor of discrimination, both by compelling long acquiescence in invidious practices, which tends to breed acceptance, and by unduly restricting the appeal of victimized minorities.

Albeit we deal with a "freeze" of the law in somewhat attenuated form, we believe the same principle governs. To be sure, Proposition 14 is theoretically subject to repeal at almost any time.[10a] But the process of amending the State constitution, in California as elsewhere, is very much more cumbersome than passing ordinary legislation. If sought by the legislature, the proposed amendment requires the concurrence of two-thirds of the members of each house before it can be submitted to the voters for ratification. Cal. Const., Art. 18, Sec. 1 (1966 Cum. Supp.),[11] while an amend-

[10a] Provided the requisite petition is filed at least 130 days theretofore, the initial proposal is submitted at the next "general election," or at an earlier special election, if the Governor so determines. Calif. Const., Art. 4, sec. 1. General elections are held every two years. See Calif. Elections Code, § 23.

[11] The same legislative vote is required whether the legislature wishes to draft its own proposal or suggest a constitutional convention. In the second case, the proposal to call a con-

ment proposal initiated by the people is submitted only if it obtains a number of signatures equal to 8 percent of the votes cast in the last gubernatorial election. Cal. Const., Art. 4, Sec. 1. Today, the initiative procedure would require a petition subscribed by almost half a million voters.[12] Thus, enshrining the right to discriminate in the constitution not only clothes it with the traditional immutability that inures to constitutional texts but places a very serious additional burden on even the most dedicated advocates of repeal.

The prejudice is particularly acute when the victims are relatively small minorities—the typical situation with respect to laws which authorize discrimination on account of race, religion or national origin. Unaided, they can never secure repeal of a hostile constitutional provision. Indeed, it is questionable whether those most likely to be subjected to housing discrimination could even provoke a vote on the question of repealing Proposition 14. It is hardly realistic to suppose they could persuade two-thirds of the legislators to repudiate the recorded preference of their constituents. And the initiative alternative is no more promising. None of the chief presumptive victims—Negroes, Orientals, Mexicans, nor Indians—if they must depend on the members of their own groups, have sufficient numerical strength to require submission of

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vention must be submitted to popular vote and the convention's draft must then be ratified by the people. Cal. Const., Art. 18, Sec. 2.

[12] 6,019,670 votes were cast for the gubernatorial candidates in the 1966 election. See New York Times, November 10, 1966, p. 34. Thus, an initiative petition proposing a constitutional amendment would require 481,574 signatures.

the issue to the voters.[13] Nor do all the racial minorities combined.[14] What is more, such minorities are usually economically less able than other groups to bear the cost of proceeding by the expensive route of initiative. Cf. *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663. But, at all events, even if they somehow succeeded in resubmitting the matter to the people, it would be with the handicap of being numerically overwhelmed.

In these circumstances, to deny the known victims of a law licensing discrimination the usual alternatives of the political process to seek a remedy, including recourse to an ordinary majority of the State legislature—often a more receptive audience[15]—is, we submit, less than even-handed dealing. It is irony amounting to injustice to relegate persecuted minorities to an appeal to unabated majority rule by insulating invidious practices in a "Declaration of Rights,"[16] whose traditional function is to protect the outnumbered against oppressive majorities.

2. Equally objectionable is the effect of Proposition 14 in forbidding local legislative bodies to act on the subject, thereby wholly withdrawing from the affected minorities, at that level also, the right to resort to the ordinary political processes to achieve equality. To be

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[13] Negroes comprise 5.6% of the total population of the State; all Orientals, 2.2%; Mexicans, 4.4%; Indians, 0.3%. See U.S. Census Bureau, *1960 Census of Population*, Vol. 1, Part 6, Tables 15, 40, 99, pp. 58, 232, 484.

[14] All non-white residents of voting age comprise only 7.5% of the total adult population. *Id.*, Table 16, pp. 56, 62.

[15] In the case of California, it was, of course, the legislature which enacted the Hawkins, Unruh and Rumfords Acts, and it declined to repeal them itself.

[16] Proposition 14 has been incorporated in the "Declaration of Rights" of the California Constitution as Article 1, Section 26.

sure, a State may normally distribute its legislative power as it sees fit—to the people, to the central legislature or to local entities. Cf. *Pacific Telephone Co.* v. *Oregon,* 223 U.S. 118; *Fortson* v. *Morris,* 385 U.S. 231; see, also, *Baker* v. *Carr,* 369 U.S. 186, 223–224. Yet there is no such absolute prerogative. As this Court said in *Gomillion* v. *Lightfoot,* 364 U.S. 339, 344–345, about the comparable power to alter or destroy political subdivisions, "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." Cf. *Graham* v. *Folsom,* 200 U.S. 248, 253–254; *Mobile* v. *Watson,* 116 U.S. 289, 305. Accordingly, it is proper to consider whether the State's action here violates the Fourteenth Amendment.

At least where gross injury results, the State, we submit, has the same burden of showing a rational basis for its action in withdrawing power from localities as it does when it grants them local option which produces substantial inequalities. See *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218. Cf. *Mobile* v. *Watson, supra.* Here, as in *Griffin,* the injury is clear and the justification wholly lacking. To deny the victims of housing discrimination any appeal for remedial legislation even at the local level—where they sometimes have substantial voting strength—is to shut off the political process arbitrarily. Indeed, the result is in some respects comparable to "fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote," condemned in *Gomillion* v. *Lightfoot, supra,* 364 U.S. at 341. Here, too, the right withdrawn is a

meaningful one, as the number of local fair housing ordinances enacted before State-wide legislation attests.[17] Yet, no more than in *Gomillion* or *Griffin*, can the State justify its present action on permissible grounds. The Fourteenth Amendment forbids it from taking the view that a local ordinance eliminating invidious discriminations is an evil. We submit the State may not, for such a reason, withdraw local political power—especially when it has already largely closed the broader avenues of redress.

III. PROPOSITION 14 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT DISABLES STATE AGENCIES FROM FULFILLING THEIR CONSTITUTIONAL OBLIGATIONS

In our view, Proposition 14 offends the Fourteenth Amendment for the additional reason that, by its plain terms, it prohibits State agencies from acting in situations in which the Equal Protection Clause imposes a constitutional duty to act. Our premises are these: (1) that the Equal Protection Clause, by its own force, requires the State to take affirmative action to prevent invidious discrimination whenever nominally "private" conduct is "intertwined" with governmental action; (2) that Proposition 14 disables State agencies from taking constitutionally required affirmative action in many of these situations; (3) that Proposition 14, as construed by the California

[17] See, *e.g.*, U.S. Commission on Civil Rights, *1959 Report*, pp. 410–415; *id.*, *1961 Report: Housing* (*Book 4*), pp. 121–122, 200; Rhyne, *Civil Rights Ordinances* (1963), pp. 90–113; *Hearings before Senate Judiciary Subcommittee on Constitutional Rights on S. 3296*, 89th Cong., 2d Sess., Part I, p. 83; *Hearings before House Judiciary Subcommittee No. 5 on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States*, 89th Cong., 2d Sess., p. 1068.

courts, must either stand or fall as a whole; and (4) that, because it is not severable, the plaintiffs in these cases have standing to challenge Proposition 14 on the ground here urged, even though its application to their particular factual circumstances would not be objectionable on that ground.

Before discussing each of the propositions in detail, we think it important to emphasize the limited reach of the argument we make here. For this purpose, we may assume that the Fourteenth Amendment permits a State to adopt a constitutional or statutory provision prohibiting its agencies and officers from taking any action to limit or restrain purely private acts of racial discrimination. To sustain our present argument, we need show only that California has not achieved that result by *this* provision of its constitution. The injunction of Proposition 14 sweeps too broadly because it not only restrains governmental interference with purely private acts of discrimination; it also inhibits State agencies from affirmatively carrying out the obligations imposed upon them by the Fourteenth Amendment with respect to property or transactions in which the State is significantly involved.

A. STATE AGENCIES HAVE A CONSTITUTIONAL DUTY TO TAKE AFFIRMATIVE STEPS TO PREVENT RACIAL DISCRIMINATION IN SITUATIONS WHERE PRIVATE CONDUCT IS INTERTWINED WITH GOVERNMENTAL ACTION

Repeated decisions of the Court have made it clear that, while the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" (*Shelley* v. *Kraemer*, 334 U.S. 1, 13; see *Civil Rights Cases*, 109 U.S. 3; *United*

States v. *Harris*, 106 U.S. 629), its protection is not limited to acts of discrimination which are formally and officially those of the State itself. Conduct which appears on the surface to be private may nonetheless be subject to the restraints of the Fourteenth Amendment if "to some significant extent the State in any of its manifestations has been found to have become involved in it"—if the State "must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722, 725. The constitutional standard was summarized recently in *Evans* v. *Newton*, 382 U.S. 296, 299:

> Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. * * * [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

This Court and lower federal courts have applied this principle in a variety of factual circumstances. State involvement has been found in otherwise private decisions to segregate restaurant facilities and other places of public accommodation (see *Burton* v. *Wilmington Parking Authority, supra; Peterson* v. *Greenville*, 373 U.S. 244, 247–248; *Robinson* v. *Florida*, 378 U.S. 153, 156–157; cf. *Bell* v. *Maryland*, 378 U.S. 226, 326–327 (dissenting opinion)); schools (see

Pennsylvania v. *Board of Trusts,* 353 U.S. 230), and parks (see *Evans* v. *Newton,* 382 U.S. 296, 301–302). Substantial State or federal financial assistance to an otherwise private enterprise has been held sufficient to subject it to the strictures of the Fourteenth Amendment. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C.A. 4), certiorari denied, 376 U.S. 938; *Eaton* v. *Grubbs,* 329 F. 2d 710 (C.A. 4). Prior governmental ownership or management of a facility transferred to private hands may have a continuing effect for purposes of the Fourteenth Amendment. *Evans* v. *Newton, supra,* 382 U.S. at 301; *Hampton* v. *City of Jacksonville,* 304 F. 2d 320 (C.A. 5); *Wimbish* v. *Pinellas County,* 342 F. 2d 804 (C.A. 5). And the interdependence of a private establishment and the publicly developed renewal area in which it is located has been held to require the private owner to meet the State's duty not to discriminate on account of race. *Smith* v. *Holiday Inns of America, Inc.,* 220 F. Supp. 1 (M.D. Tenn.), affirmed, 336 F. 2d 630 (C.A. 6).

If, as these cases demonstrate, the injunction of the Fourteenth Amendment that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws" applies whenever the State is significantly involved, even though the actual discriminatory choice is not made by a State agency, it necessarily follows that the State's duty in those circumstances is not merely to refrain from discriminating for impermissible reasons, but also to take affirmative action to insure that the private "joint

participant" does not engage in such discrimination. That principle was expressly recognized in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 724–725. The Court there observed that the State could not avoid its Fourteenth Amendment obligation to assure the non-discriminatory use of State property by leaving its lessor wholly free to admit or exclude customers on racial grounds, as he chose:

> As the chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of State participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. * * * By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. * * *

The Court concluded that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." 365 U.S. at 726. The holding is clear: in circumstances where State conduct is intertwined with private action, the Fourteenth Amendment imposes on the State an affirmative obligation to take steps aimed at

obtaining the private party's compliance with the constitutional duty not to discriminate.[18]

It follows that whenever the State is sufficiently involved in a seller's or lessor's affairs to make them "joint participants," it has an affirmative obligation to secure the private party's compliance with the constitutional standard.

B. PROPOSITION 14 DISABLES STATE AGENCIES FROM FULFILLING THEIR CONSTITUTIONAL OBLIGATION TO GUARD AGAINST DISCRIMINATION IN SITUATIONS WHERE THE STATE IS SIGNIFICANTLY INVOLVED

In unequivocal terms Proposition 14 prohibits State agencies from limiting in any manner the "right of any person" to discriminate on racial or other invidious grounds in the disposition of any interest in "his real property." It defines "person" as including every legal entity which could hold an interest in property, except only "the State or any subdivision thereof with respect to the sale, lease or rental of property *owned by it*" (p. 2, *supra*, emphasis added). It also defines "real property" as including "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed" (p. 2, *supra*). Thus, it seems plain, Proposition 14 restrains State agencies from taking any affirmative steps whatever to prevent arbitrary discrimination in

[18] Nor does that decision stand alone. The principle was implicit in *Griffin* v. *Illinois*, 351 U.S. 12, and in *Douglas* v. *California*, 372 U.S. 353, and was, in fact, adverted to in the dissenting opinions. 351 U.S. at 34; 372 U.S. at 362. So, also, it was one aspect of the ruling in *Terry* v. *Adams*, 345 U.S. 461. See, also, *Griffin* v. *County School Board*, 377 U.S. 218, 233.

all situations other than a disposition of government-owned property directly by the government itself. That is too narrow an exception to meet the demands of the Fourteenth Amendment.

At the outset, we notice two obvious respects in which the injunction of Proposition 14 is unjustifiably broad: it permits discrimination to be practiced by private persons even with respect to property owned by the State; and it permits even State agencies to discriminate with respect to property which is not *owned* by the State but merely leased to it or otherwise subject to its control. Proposition 14 nowhere recognizes that factors other than State ownership may amount to sufficient State involvement to call the Fourteenth Amendment into play. Indeed, by securing the right to discriminate "irrespective of how [the interest in real property is] obtained or financed", the provision wholly immunizes private residential discrimination even when practiced in a development financed entirely with State funds. In sum, it seems plain that Proposition 14 impermissibly licenses invidious practices in a great variety of transactions which the Fourteenth Amendment requires the State to purge of discrimination.

The clash between Proposition 14 and the demands of the Equal Protection Clause becomes apparent from an examination of a few hypothetical situations in which State agencies or their representatives would be confronted with conflicting obligations:

1. The State or its subdivision finances, at low interest rates, the construction of a large apartment

project. Should non-discrimination clauses be inserted in the loan agreements?

2. A municipality uses a large portion of its downtown area for an urban redevelopment project. It spends State and city funds to beautify the area and draws up plans for residential construction to be performed in that area on property owned by certain private real-estate firms which are specially licensed for this purpose. Should it impose non-discrimination obligations upon these firms?

3. A private corporation declares a municipality trustee of certain land and buildings which are to be rented as low-income housing to white residents. May the municipality admit Negroes to residence?

4. The State leases a portion of a State park to a private developer who builds cabins which are rented on a yearly basis. Should the State require him to make the cabins available to persons of all races?

5. The State has owned and operated a low-income project. It leases the project to a private corporation on the condition that it continue to be used for low-income housing. Should the State take steps to insure that a non-discriminatory policy is followed?

The above hypotheticals are, of course, only illustrative of the "multitude of relationships [which] might appear to some to fall within the Amendment's embrace." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726. The decisions we have already cited (pp. 34–35, *supra*) establish that in all these circumstances the Fourteenth Amendment applies to the

nominally private decision to discriminate, and that the State would have an affirmative duty to prevent such discrimination. But in each case Proposition 14 would forbid State agencies from taking any action. In the first and second hypotheticals, the non-discrimination clauses would plainly constitute abridgments of the private builders' "right"—protected by Proposition 14—to the free choice of tenants. In the third hypothetical, the municipal trustee would be abridging the legal owner's "right" not to rent to Negroes; the exemption would not apply because the property is not "owned" by the municipality. In the fourth and fifth hypotheticals—as is also true of the first and second—the "person" engaging in the discrimination is not the State but a private party. Although the State, when it is itself leasing its own land, may not discriminate on account of race, Proposition 14 gives the private lessee an inviolable right to do so. And nothing in Proposition 14 authorizes the State, when it leases its land, to demand a nondiscrimination clause as a condition of the lease. Indeed, that very conduct appears to violate the lessee's "right" as protected by Proposition 14.

To be sure, the Supreme Court of California in *Redevelopment Agency of Fresno* v. *Buckman,* 64 Cal. 2d 886, 50 Cal. Rptr. 912, 413, P. 2d 856, pretermitted the question whether Proposition 14 would be violated if the State Redevelopment Agency attempted to prevent racial discrimination on the part of real estate redevelopers who had been financed by State or federal funds. However, the California constitutional

provision appears clear on its face; in unequivocal terms, it proscribes any such steps. Moreover, in *Peyton* v. *Barrington Plaza Corp.*, 64 Cal. 2d 880, 50 Cal. Rptr. 905, 413 P. 2d 849, decided the same day, the court apparently held that Proposition 14 applied to a publicly assisted housing accommodation located in the midst of an urban renewal center.

C. RESPONDENTS MAY CHALLENGE THE CONSTITUTIONALITY OF PROPOSITION 14 ON THE GROUND SUGGESTED HERE EVEN THOUGH ITS APPLICATION TO THEIR CASES WOULD NOT BE OBJECTIONABLE ON THAT GROUND.

We have demonstrated that Proposition 14 collides, in a substantial variety of situations, with the commands of the Fourteenth Amendment. For the purpose of the present argument we do not, however, contend that the two cases presently before the Court involve the elements of State participation which, under the principles and decisions just discussed, give rise to an affirmative obligation on the part of the State to prevent private acts of racial discrimination. The question remaining, therefore, is whether the respondents in these cases may attack application of Proposition 14 to them on the ground that it would be unconstitutional as applied to other situations. We believe that under this Court's decisions that avenue is available to them, and that the plain unconstitutionality of Proposition 14 in many of its probable applications warrants striking down the provision in its entirety.

Preliminarily, we note that there can be no question as to respondents' "standing" to sue in the sense that they have "sustained or [are] immediately in danger of sustaining some direct injury as the result of * * * enforcement" of the challenged provision.

Massachusetts v. *Mellon,* 262 U.S. 447, 488. Respondents were accorded statutory rights under California Civil Code §§ 51, 52, and upon proving their allegations they would have been entitled to the relief requested in these cases if not for Proposition 14. The injury to them is, therefore, most direct in nature; the constitutional provision invalidates a State statute which has given them a legal right.

A more serious question is presented, however, by the principle—often repeated in this Court—that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines,* 362 U.S. 17, 21, and see authorities there cited. That principle—"that a litigant may only assert his own constitutional rights or immunities" (362 U.S. at 22)—is, as this Court noted in *Raines* (*id.* at 22–23), subject to a substantial number of exceptions. We believe that at least three reasons exist for not applying it to these cases.

First, this Court noted expressly in *Raines* that the general limitation discussed above is inapplicable "when a state statute comes conclusively pronounced by a state court as having an otherwise valid provision or application inextricably tied up with an invalid one * * *." 362 U.S. at 23. That, we believe, is the situation here because the highest court of California has, consistently with its prior decisions, read Proposition 14 as being the kind of provision which must either stand or fall as a single unit. It has held,

in other words, that under California law the constitutional provision is indivisible and cannot be sustained in part if it is in part invalid.

Although the court below did not proceed on the theory which we are presently urging, it did hold that Proposition 14 was invalid under the Fourteenth Amendment insofar as it related to racial discrimination. It then went on to recognize that there were other bases for choice than racial ones which might be exercised by persons subject to the provision, and that "in many applications [of Proposition 14] no unconstitutional discrimination will result" (R. 29). Notwithstanding this observation and the added circumstance that Proposition 14 itself contains an explicit severability clause, the Supreme Court of California held that the constitutional provision was not severable and that the clause saving it whenever it might constitutionally be applied "is ineffective" (R. 31).

That conclusion followed from the earlier decisions of California's highest court in *Franklin Life Ins. Co.* v. *California,* 63 Cal. 2d 222, 404 P. 2d 477, and *In re Blaney,* 30 Cal. 2d 643, 184 P. 2d 892, on which the court relied in the present case. Those decisions had established two State tests of severability: (1) whether "the language of the statute is mechanically severable, that is, [whether] the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words" (30 Cal. 2d at 655, 184 P. 2d at 900), and (2) whether "enforcement [of the constitutional part] entails the danger of an uncertain or vague future application of the statute" (63

Cal. 2d at 227, 404 P. 2d at 482). The severability of Proposition 14 under the theory of unconstitutionality which we urge apparently fails both California standards. There is no way of "mechanically" separating out, under the present text of Proposition 14, the situations in which the State is sufficiently involved to subject the private "joint participant" to the obligations of the Fourteenth Amendment from those cases where the discrimination is entirely private. And there could be no clearer instance of "uncertain or vague future application" than would follow a decision sustaining Propostion 14 in part. This Court noted in *Burton* that decision in this area turns entirely on "the framework of the peculiar facts or circumstances present." 365 U.S. at 726. There is no way of delimiting in advance, with adequate certainty, the constitutional applications of Proposition 14.

In sum, the State court's holding, binding on this Court, is that all situations covered by Proposition 14 are "inextricably tied up" (362 U.S. at 23) with one another, and that one application cannot be sustained while the other falls. In this posture of the case, the outcome here is controlled by the rule announced in *Dorchy* v. *Kansas,* 264 U.S. 286—that, although a State statute containing an unconstitutional provision might be saved in part, this Court would be bound by the determination of the State's highest court on the question whether the provision was severable. Because the State courts had not spoken to the question of severability and the challenged statute contained an explicit severability clause (264 U.S. at 290, n. 2),

this Court remanded the *Dorchy* case to the Supreme Court of Kansas for it to determine the issue. In the present case, however, the California court has already held that Proposition 14 is not severable insofar as it might be thought necessary to save it with respect to non-racial discrimination. While that is not the precise context of our present concern, the court's reasoning applies fully—and, indeed, more persuasively—to the issue of severability we have discussed. We therefore submit that, unlike *Dorchy,* remand is not required here; the judgments may be affirmed directly.

A *second* reason for viewing this case as outside the rule "that a litigant may only assert his own constitutional rights or immunities" (362 U.S. at 22) is that, like *Barrows* v. *Jackson,* 346 U.S. 249, 257, the present controversy concerns rights which cannot be readily asserted by those whom the impermissible conduct affects directly. We have shown that Proposition 14 has the effect of restraining State agencies from taking the affirmative steps required by the Fourteenth Amendment whenever State and private action are "intertwined." We know of no case, however where suit has been successfully maintained against the State or its agencies to compel it to perform these obligations. Yet the real vice of Proposition 14, according to our present submission, is precisely that State agencies will sit idly by even where the Fourteenth Amendment commands them to

act and will take no hand in insuring that racial discrimination is not practiced.[19]

Finally, a *third* ground for holding the "rule of practice" discussed in *Raines* (362 U.S. at 22) inapplicable here, is that the consequences of Proposition 14 are, in significant respects, like those of an overbroad restriction on speech—as to which there is a well settled exception to strict rules of standing. *NAACP* v. *Button,* 371 U.S. 415, 432–433; *Smith* v. *California,* 361 U.S. 147, 151; *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98; see *United States* v. *Raines,* 362 U.S. 17, 22. Statutes affecting First Amendment freedoms and other personal liberties protected by the Bill of Rights are tested on their face and not by their application to the particular cases brought by the parties challenging them because "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button,* 371 U.S. 415, 433. This Court recently invoked this principle in favor of the freedom to travel secured by the Fifth Amendment, *Aptheker* v. *Secretary of State,* 378 U.S. 500, 515–517, and it applies here as well.

The protected right of Negro citizens not to be denied equal protection by the State or by private persons acting jointly with the State is no less "delicate

[19] The successful suit of a rejected Negro applicant for a residence in publicly assisted housing will not likely cure that central defect, for the court's order in such a case ordinarily does no more than direct the private proprietor to cease his discriminatory conduct.

and vulnerable," we submit, than the freedom to travel. Proposition 14, in its overbreadth, prevents the full realization of those rights in California. For, just as an overbroad restriction in the area of speech has a "chilling effect" on expression which is constitutionally protected (*Dombrowski* v. *Pfister*, 380 U.S. 479, 487), so does the existence of an overbroad prohibition in this area inhibit State agencies and public officials from taking the action required of them by the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted.

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